Supreme Court, U.S.
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IN THE

Supreme Court of the United States

IRENE FLICK,

Petitioner,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are the flood insurance premium dollars which are segregated, accumulated and retained in the National Flood Insurance Fund [NFIF] for payment of flood insurance claims under the National Flood Insurance Program [NFIP] and for payment of NFIP operating expenses "**Treasury dollars**" which are subject to the exclusive control of Congress as provided in the Appropriations Clause of the U.S. Constitution [Article I, Section 9, Clause 7]? Or are they "**policyholder dollars**" which are subject to judicial enforcement of the terms of the policyholder's flood insurance contract according to ordinary principles of contract law and insurance law?

If policyholder dollars in the NFIF, which is "located in" [but not a "part of"] the Treasury **are** subject to the limitations imposed by the Appropriations Clause on the Judiciary, are the policyholder premium dollars retained for claims and expense payments by private insurers in their own accounts outside of the U.S. Treasury also subject to the limitations of the Appropriations Clause?

PARTIES TO THE PROCEEDING

Petitioner is property owner and National Flood Insurance policyholder, IRENE FLICK, who was the plaintiff in the District Court and the appellant in the Ninth Circuit Court of Appeals.

Nominal respondent is Liberty Mutual Fire Insurance Company, who at all stages of the proceedings has been defended by FEMA, and who was the defendant in the District Court and the appellee in the Ninth Circuit Court of Appeals.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *Irene Flick v. Liberty Mutual Fire Insurance Company*, 205 F.3d 386 (9th Cir. 2000). The District Court opinion (App. B) is unpublished.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of appeals was entered on February 15, 2000. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on March 29, 2000 (App. C). Flick's application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case was granted to and including July 27, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Appropriations Clause of the Constitution of the United States, Article 1, Section 9, Clause 7, which provides in relevant part:

> No money shall be drawn from the Treasury, but in consequence of appropriations made by law; . . .

The case also involves assorted provisions of the National Flood Insurance Act of 1968, as amended, and the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. § 4001, *et seq*.

STATEMENT OF THE CASE

Flick v. Liberty Mutual stands out as the first and only case in United States history which has stretched the Appropriations Clause of the United States Constitution to deprive parties to private insurance contracts of a forum to adjudicate claims controversies and to exempt insurance contracts between private parties from ordinary rules of contract law and insurance law. If for no other reason, certiorari should be granted to rein in this dangerous, unnecessary, and unwarranted excursion into judicial activism for the benefit of private industry.

Certiorari should also be granted to bring to an end twenty years of harsh doctrine built on the mistaken belief that the National Flood Insurance Program (NFIP) is subsidized by the taxpayers.

Throughout these proceedings the following have been undisputed:

1. Flick's claim for flood-induced subsidence damage to her home was within the coverage of the flood insurance policy issued by Liberty Mutual;

2. Strict compliance with the 60-day proof-of-loss requirement in the policy was **not possible** because of the complex engineering and design process which had

to be undertaken to satisfy the proof-of-loss requirement for an accurate assessment of the amount of loss;

3. Strict compliance with the 60-day proof-of-loss requirement would almost always be **impossible** in cases of flood-induced ground subsidence (205 F.3d at 397);

4. Flick promptly and diligently provided all required claim information to Liberty Mutual and Liberty Mutual suffered no prejudice by any of Flick's delays;

5. Under ordinary principles of insurance law applicable in a majority of states, including California, Flick's right to coverage could not be forfeited under the proof-of-loss clause because she substantially complied with proof-of-loss requirements and there was no prejudice to the insurer.

In the District Court, Flick argued that lack of strict compliance with the 60-day proof-of-loss requirement was not a defense to coverage under "ordinary principles of insurance law and contract law" where strict compliance was **impossible** and the requirements of the notice/prejudice rule as prescribed by "ordinary principles of insurance law" had been satisfied (CR 54).

Liberty Mutual replied that **impossibility was no excuse** for failure to strictly comply with the 60-day proof-of-loss requirement because NFIP policies issued by the federal government or its private industry affiliates are not governed by ordinary principles of insurance law or contract law (CR 56).

The trial court agreed with Liberty Mutual (App. B).

On appeal to the Ninth Circuit Flick argued that the harsh doctrines adopted by a bare majority of a deeply divided U.S. Supreme Court in *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), which were justified on the grounds that Federal Crop Insurance was subsidized by the taxpayers, should never have been extended to policyholder claims under the National Flood Insurance Program because NFIP's own published data, the enabling legislation, and the public pronouncements of the director of the NFIP showed that the NFIP was **not** subsidized by the taxpayers. Flick further pointed out that the NFIP was, in fact, completely self-sustaining from policyholder premiums, that it was designed to continue to be completely self-sustaining from policyholder premiums, and that adjustments in the program had been and were being made periodically to assure that the program would continue to be self-sustaining.

For reasons which are not entirely clear, the majority chose to ignore the NFIP data and pronouncements and attempted to perpetuate the harsh traditions which began with *Merrill* on the grounds that taxpayers might "someday" be called upon to subsidize the NFIP (205 F.3d at 393).

Apparently fearing that the absence of a taxpayer subsidy for the NFIP might eventually be demonstrated, the majority in Flick went on to argue that, even if the NFIP was shown to be self-sustaining, the federal courts were powerless to apply ordinary principles of contract and insurance law to claims disputes under NFIP insurance contracts because policyholder premiums are accumulated and retained in the National Flood Insurance Fund (NFIF) which is "located in the Treasury" and is therefore governed by the

Appropriations Clause (205 F.3d at 395). The majority never did explain how the National Flood Insurance Fund could borrow from and pay interest to the U.S. Treasury (205 F.3d at 392 n.6) and, at the same time be a "part of" the U.S. Treasury which is subject to the Appropriations Clause. The published pronouncements of the NFIP, of course, have no trouble distinguishing between flood insurance premium dollars which are retained in the NFIF and "taxpayer dollars" which are retained in the U.S. Treasury. See, for example, the Federal Emergency Management Administration (FEMA) announcement of September 23, 1999 which states:

> **Taxpayers reap the benefit**. Because the NFIP uses flood insurance premium dollars, not taxpayer dollars, to pay claims and operating expenses, all taxpayers benefit when flood victims have flood insurance. The NFIP reduces federal disaster assistance outlays by enabling people to insure against flood losses rather than relying on costly Federal disaster assistance and tax write-offs for uninsured losses. Since 1978, almost $8.3 billion in flood losses have been paid from premiums, thereby reducing the burden on the taxpayer.

(Announcement currently published at http://www.fema.gov/nfip/reform.htm)

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE MAJORITY WITH REGARD TO THE APPROPRIATIONS CLAUSE CONFLICTS WITH THE EXPRESS GRANT OF DISTRICT COURT JURISDICTION OVER NFIP CLAIMS CONTROVERSIES.

42 U.S.C. § 4072 provides:

> §4072. *Adjustment and payment of claims; judicial review; limitations; jurisdiction*
>
> In the event the program is carried out as provided in section 4071 of this title, the Director shall be authorized to adjust and make payment of any claim for proved and approved losses covered by flood insurance, and upon the disallowance by the Director of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Director, may institute an action against the Director on such claim in the United States district court in the district in which the insured property or the major part thereof shall have been situated, and original exclusive jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in the controversy.

Nothing in that section or in any other section of the enabling legislation suggests that the **power** of the U.S. District Court

to adjudicate NFIP claims controversies is limited in any way by the nature of the claims controversy or by the Appropriations Clause. If Congress had intended that the scope of judicial review be limited by the Appropriations Clause or that it be limited to controversies not involving the 60-day proof-of-loss requirement, it could have and presumably would have said so.

Although the majority opinion in *Flick* acknowledges the exclusive jurisdiction of the Federal District Court over NFIP claims disputes it would have us believe that the courts are, nevertheless, rendered powerless by the Appropriations Clause to adjudicate any such claims.

The opinion of the majority with regard to the Appropriations Clause was apparently inspired in part by the decision of this Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). In the *Richmond* case, this Court concluded that the Appropriations Clause limited the power of the judiciary to order the payment of disability benefits to a federal employee. In that case, the funds would have been derived exclusively from taxpayer funds in the U.S. Treasury. The majority in *Flick* either failed to recognize or failed to acknowledge that NFIP claims are not paid from taxpayer funds but are paid out of the policyholder premiums held either by the private insurer issuing the policy or from the National Flood Insurance Fund.

The breadth of the Appropriations Clause perhaps became further blurred in *Republic National Bank of Miami v. United States*, 506 U.S. 80 (1992) when this Court failed to reach a clear consensus as to the extent of the application of the Appropriations Clause to seized property.

Certiorari should therefore be granted to resolve any lingering uncertainty as to the breadth of the Appropriations Clause and to clearly establish that the Federal District Court not only has the responsibility to decide all aspects of NFIP claims controversies according to "standard insurance law principles", but that it has the power to do so.

II.

THE HARSH DOCTRINES DERIVED FROM *FEDERAL CROP INSURANCE CORPORATION v. MERRILL*, 332 U.S. 380 (1947) SHOULD BE EXPRESSLY ABANDONED IN LIGHT OF THE SELF-SUSTAINING DESIGN OF THE NFIP PROGRAM AND THE NFIP RECORD WHICH DEMONSTRATES THAT IT HAS BEEN AND VERY LIKELY WILL CONTINUE TO BE SELF-SUSTAINING.

The harsh doctrines in the NFIP cases prior to *Flick* simply ignored the fact that payments were made out of separate, segregated policyholder funds and characterized the loss payments as "a direct charge on the public treasury" *Gowland v. Aetna*, 143 F.2d 951 (5th Cir. 1998) and stated without any factual basis that the NFIP program is "federally subsidized" (*Id.* at 143 F.3d 955).

Nearly every published opinion in NFIP cases prior to *Flick* attempted to justify harsh results by the following quote from the majority opinion in *Merrill* at 332 US 385:

> The oft-quoted observation in *Rock Island Arkansas and Louisiana Railroad Company vs. United States*, 254 U.S. 141, 143, that "men must turn square corners when they deal with the

> government" does not reflect a callous outlook, it merely expresses the duty of all courts to observe the conditions defined by Congress for charging the public treasury.

None of those opinions, however, considered the possibility that NFIP loss payments whether made out of premiums retained by private insurers or out of the National Flood Insurance Fund were not in fact "charges against the public treasury" but simply indemnity disbursements from policyholder funds as opposed to taxpayer funds.

It is time for the Courts to recognize that the taxpayers are not subsidizing the NFIP but are in fact benefitting from it in variety of ways. It is also time to recognize that, against this background, there is no longer any justification for "harsh and unworkable" rules governing NFIP loss payments to flood victims and that NFIP contracts should be governed by "ordinary principles of insurance law and contract law".

CONCLUSION

By its own account:

> The NFIP is now one of the largest property and casualty insurers in the Nation. In fact, it is the largest single-line insurer, with over 4 million polices in effect nationwide and $485 billion in coverage.

(Announcement currently published at http://www.fema.gov/nfip/jahsp3.htm).

If the majority opinion in *Flick* is allowed to stand, one of the largest insurance programs in the Nation will be left without a forum to adjudicate claims controversies. Certiorari should therefore be granted to assure that the Federal District Courts will continue to have not only the jurisdiction but the power to decide all aspects of NFIP claims controversies in accordance with general principles of insurance law and contract law.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 15, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-16485
D.C. No. CV-97-00703-WHO

IRENE FLICK,

Plaintiff-Appellant,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Argued and Submitted
November 5, 1999 — San Francisco, California

Filed February 15, 2000

Before: Alfred T. Goodwin, Mary M. Schroeder, and
Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Alarcon;
Dissent by Judge Schroeder

* * *

Appendix A

OPINION

ALARCON, Circuit Judge:

Irene Flick ("Flick") appeals from the order granting summary judgment in favor of the Liberty Mutual Fire Insurance Company ("Liberty Mutual"). Flick filed a civil complaint seeking damages resulting from Liberty Mutual's denial of a claim under a standard flood insurance policy that was underwritten by Liberty Mutual as part of the National Flood Insurance Program. The district court granted summary judgment in favor of Liberty Mutual on the basis that Flick had failed to comply strictly with the policy's 60 day sworn proof of loss requirement. Flick contends that the district court erred in applying the rule of strict compliance to the policy's sworn proof of loss requirement. We affirm. We conclude that the strict compliance rule is applicable to policies written by private insurance companies under the National Flood Insurance Program, because those insurers draw funds from the United States Treasury ("Treasury") to pay flood loss claims.

I

Congress enacted the National Flood Insurance Act of 1968 in response to a growing concern that the private insurance industry was unable to offer reasonably priced flood insurance on a national basis. *See* 42 U.S.C. § 4001(a), (b); *Van Holt v. Liberty Mut. Fire Ins. Co.*, 163 F.3d 161, 165 & n.2 (3d Cir. 1998). A report by the Secretary of the Department of Housing and Urban Development ("HUD") had indicated that it was not feasible for the private insurance

industry, acting alone, to provide flood insurance at a reasonable price.[1] *See* Staff of Senate Comm. on Banking and Currency, 89th Cong., 2d Sess., *Insurance and Other Programs for Financial Assistance to Flood Victims* 98-99 (Comm. Print 1966) (report from Robert C. Weaver, Secretary of HUD). The HUD report found that private insurers traditionally had refused to write flood policies in the belief that they lacked an adequate actuarial basis for providing coverage and that the public was not interested in purchasing flood insurance. *See id.* The report also found that, even if the private insurance industry were to have offered flood insurance on a sound actuarial basis, inhabitants of flood prone areas would have rejected unsubsidized coverage as too costly or too uneconomical.[2] *See id.*

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1. The Southeast Hurricane Disaster Relief Act of 1965 directed the Secretary of HUD to undertake a study and prepare a report on the various programs which might be established to help provide financial assistance to those suffering property losses in flood and other natural disasters. Publ. L. No. 89-339, § 5. The HUD report, which was submitted to Congress in 1966, provided the basis for the enactment of the National Flood Insurance Act. *See* Edward T. Pasterick, *The National Flood Insurance Program, in Paying the Price: The Status and Role of Insurance Against Natural Disasters in the United States* 125, 127 (Howard Kunreuther & Richard J. Roth, Sr. eds., 1998). Subsequent revisions of that legislation have also been based on the HUD report's suggestions. *See id.*

2. Inhabitants of flood prone areas must pay exorbitant actuarial rates for flood insurance, because they are the most likely to make claims for flood losses. In locations where the risk of flooding is high, it can be economically more rational to abandon existing structures than to purchase flood insurance at the full actuarial rate. *See* Staff of Senate Comm. on Banking and Currency, 89th Cong., (Cont'd)

Appendix A

The National Flood Insurance Act, therefore, authorizes the federal government to establish the National Flood Insurance Program ("NFIP"), a program with "large-scale" federal involvement, to provide affordable flood insurance on a national basis and to discourage the construction of new structures in flood prone areas. *See* 42 U.S.C. §§ 4001(b), 4011(a); 1968 U.S. Code Cong. & Admin. News 2873, 2966-67, 2969. To accomplish those goals, the act authorizes the federal government to offer flood insurance at below actuarial rates for high risk structures erected before the preparation of a community's flood insurance rate map. *See* 42 U.S.C. § 4015(a)-(c); 1968 U.S.Code Cong. & Admin. News at 2969. The act does not, however, authorize the NFIP to provide a similar subsidy to owners of structures that are built after a community's actuarial rates are set. *See* 42 U.S.C. § 4015(c); 1968 U.S.Code Cong. & Admin. News at 2969.

The National Flood Insurance Act outlines two alternative frameworks for implementing the NFIP. *See generally National Flood Insurers Ass'n v. Harris*, 444 F. Supp. 969, 970-72 (D.D.C. 1977) (discussing the two authorized methods for implementing the NFIP). Part A allows an associated pool of private insurance companies to implement a privately operated program. *See* 42 U.S.C. §§ 4051, 4052. Part B authorizes the federal government to implement an alternative program through the "facilities of the federal government." 42 U.S.C. § 4071.

(Cont'd)
2d Sess., *Insurance and Other Programs for Financial Assistance to Flood Victims* 98-99 (Comm. Print 1966) (report from Robert C. Weaver, Secretary of the Department of Housing and Urban Development).

Initially, the NFIP was implemented under Part A and administered by an associated pool of private insurance companies pursuant to an annual contract with HUD. *See* 42 U.S.C. §§ 4051, 4052; *National Flood Insurers Ass'n*, 444 F. Supp. at 970-71 (discussing the implementation of the NFIP under Part A). The associated pool provided the risk capital, issued flood insurance policies, and paid all claims for flood losses. *See Sandia Oil Co. v. Beckton*, 889 F.2d 258, 263 (10th Cir. 1989); *Kolner v. Director, Fed. Emergency Management Agency*, 547 F. Supp. 828, 829 (N.D. Ill. 1982). The federal government made "premium equalization payments" to the associated pool to compensate for premiums that were set below actuarial rates. *See* 42 U.S.C. § 4054; *Sandia Oil Co.*, 889 F.2d at 263. It also provided reinsurance to cover flood losses that exceeded the insurance risk assumed by the industry pool. *See* 42 U.S.C. § 4055; *Sandia Oil Co.*, 889 F.2d at 263.

In 1977, HUD decided to discontinue the private operation of the NFIP under Part A. It communicated its intent to Congress to provide flood insurance through the "facilities of the federal government" pursuant to Part B of the National Flood Insurance Act. *See* 42 U.S.C. § 4071; 42 Fed. Reg. 58569 (1979) (giving Congress notice of the transition to a Part B program); *Kolner*, 547 F. Supp. at 829-30. On January 1, 1978, HUD assumed full control of the program with the intention of retaining, to the extent practicable, the services of private insurers as "fiscal agents" of the United States. *See* 42 U.S.C. § 4071; 42 Fed. Reg. 58573 (1977); *Kolner*, 547 F. Supp. at 829. At that time, all flood insurance policies were deemed issued by the Federal Insurance Administration. *See Kolner*, 547 F. Supp. at 829.

Appendix A

In 1978, HUD delegated to the Federal Emergency Management Agency ("FEMA") its authority to operate both the NFIP and the Federal Insurance Administration.[3] *See* Reorganization Plan No. 3 of 1978, §§ 202, 304, 43 Fed. Reg. 41943, 41943-45 (1978). FEMA assumed managerial responsibility for the operation of the program and took full control of the payment or disallowance of all flood insurance claims. *See Berger v. Pierce*, 933 F.2d 393, 395 (6th Cir. 1991). It then established the National Flood Insurance Fund in the Treasury of the United States to pay claims and administrative expenses. *See* 42 U.S.C. § 4017(a), (d); *Sandia Oil Co.*, 889 F.2d at 263.

In 1983, FEMA exercised its regulatory authority under 42 U.S.C. § 4081(a) and created the "Write Your Own" ("WYO") program to assist it in marketing flood insurance through the "facilities of the federal government." *See* 42 U.S.C. §§ 4081(a), 4071; 44 C.F.R. § 62.23-24; 48 Fed. Reg. 46789 (1983) (amending the federal regulations to establish the WYO program); *Van Holt*, 163 F.3d at 165. The WYO program allows private insurers to write standard flood insurance policies under their own names. *See* 44 C.F.R. § 62.23. Coverage is provided under the auspices of the NFIP, pursuant to the program's regulations, and is identical in scope and in cost to policies issued directly by FEMA. *See* 48 Fed. Reg. 46789 (1983). Under the NFIP regulations, a claimant under a standard flood insurance policy must submit

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3. Congress amended the National Flood Insurance Act in 1983 to substitute the Director of FEMA for the Secretary of HUD. *See* Act of Nov. 30, 1983, Pub. L. No. 98-181, § 451(d), 97 Stat. 1153; 1983 U.S. Code. Cong. & Admin. News 1153, 1229.

a sworn proof of loss within 60 days of any flood loss. *See* 44 C.F.R. pt. 61, app. A(1), art. 9(J)(3).

II

Liberty Mutual insured Flick for flood loss under an insurance policy that it issued as part of the WYO program. The Liberty Mutual policy, which was written as a standard flood insurance policy, required Flick to submit a sworn proof of flood loss within 60 days of any flood loss. On December 11, 1995, flooding caused the foundation of Flick's house to subside. Flick notified Liberty Mutual of her flood loss on February 6, 1996. She did not, however, submit a sworn proof of loss at that time. Liberty Mutual denied the claim on April 8, 1996, because, among other reasons, Flick had failed to file a sworn proof of loss within 60 days. Flick finally submitted a sworn proof of loss on September 17, 1996, approximately nine months after the flood loss had occurred.

Flick then commenced this lawsuit in district court, asserting state law causes of action for breach of contract and breach of the covenant of good faith and fair dealing. Both parties stipulated that the National Flood Insurance Act preempted those claims. Liberty Mutual moved to bifurcate the trial and to try the issue of whether Flick had failed to submit a sworn proof of loss within 60 days of the flood loss. Flick agreed that the sworn proof of loss issue should be summarily adjudicated before trial. In a pretrial conference, the district court granted summary judgment in favor of Liberty Mutual, because Flick had failed to file a sworn proof of loss within 60 days of her flood loss.

Appendix A

III

In this appeal, Flick contends that the district court erred in granting summary judgment. She argues that the rule of strict compliance, which is applicable to policies issued by the federal government that provide for payment of losses from public funds, is inapplicable to the sworn proof of loss requirement in insurance policies issued under the NFIP. To support that proposition, she asserts that flood insurance losses under the NFIP have been, and will continue to be, paid entirely out of a surplus of retained flood insurance premiums. Flick suggests that we (1) adopt a rule of substantial compliance or notice prejudice to govern the sworn proof of loss requirement in the standard flood insurance policy or, in the alternative, (2) find an exception to the rule of strict compliance for flood induced subsidence cases.

We have jurisdiction pursuant to 42 U.S.C. § 1291.[4] We review de novo a grant of summary judgment. *See Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

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4. The district court had subject matter jurisdiction pursuant to 42 U.S.C. § 4072. *See* 42 U.S.C. § 4072 (conferring original exclusive jurisdiction over actions against FEMA); *Van Holt*, 163 F.3d at 167 (holding that 42 U.S.C. § 4072 also confers subject matter jurisdiction over actions against WYO insurers).

"The law is clear that, as contracts, [standard flood insurance policies] issued under the National Flood Insurance Program . . . are governed by federal law applying standard insurance law principles." *McHugh v. United Serv. Auto. Assoc.*, 164 F.3d 451, 454 (9th Cir. 1999) (citing *Brazil v. Giuffrida*, 763 F.2d 1072, 1074-75 (9th Cir. 1985)). There is a compelling interest in assuring uniformity of decision in cases involving the NFIP. *See Brazil*, 763 F.2d at 1075 (quoting *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1978)). "Since the flood insurance program is a child of Congress, conceived to achieve policies which are national in scope, and since the federal government participates extensively in the program both in a supervisory capacity and financially, it is clear that the interest in uniformity of decision present in this case mandates the application of federal law." *Id.*

Federal law has long recognized that an insured must comply strictly with the terms and conditions of a federal insurance policy. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947). In *Merrill*, the Supreme Court recognized a general "duty of all courts to observe the conditions defined by Congress for charging the public treasury." *Id.* at 385. The Court held that a group of farmers could not recover for crop losses under a federal crop insurance policy, because their claims did not comply with the terms and conditions for coverage set forth in the Wheat Regulations.[5] *See id.* In so holding, the Court noted that "not

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5. In *Merrill*, the Federal Crop Insurance Corporation promulgated regulations specifying the conditions under which it would insure wheat crops. One regulation made "spring wheat which has been reseeded on winter wheat acreage" ineligible for insurance. (Cont'd)

even the temptations of a hard case" may provide a basis for a recovery that is contrary to federal regulations. *Id.* at 386.

In the context of flood insurance, we have recognized the heavy burden that a claimant must overcome in order to avoid the sworn proof of loss requirement in the standard flood insurance policy. *See Wagner v. Director, Fed. Emergency Management Agency*, 847 F.2d 515, 518-19 (9th Cir. 1988). In *Wagner*, we held that a group of claimants could not estop FEMA from denying their claims for failure to file a timely sworn proof of loss. *Id.* at 519-20. In reaching that decision, we reasoned that the sworn proof of loss requirement is a condition precedent to a waiver by the federal government of its sovereign immunity and, as such, a procedural requirement that must be taken seriously. *See id.* at 518. We then concluded that the claimants could not establish the more stringent requirement necessary to estop the federal government from insisting on strict compliance with the sworn proof of loss requirement. *See id.* at 519-20.

While our result in *Wagner* is sound, the Supreme Court has since recognized that our power to avoid the terms and conditions of a federal insurance policy is even more curtailed. In *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), the Court acknowledged that the

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(Cont'd)
Without knowledge of that requirement, the farmers applied and were insured for a wheat crop that had been reseeded on winter wheat acreage. The Supreme Court held that the Federal Crop Insurance Corporation was not liable for the loss on the reseeded acreage, even if a private insurance company could have been held liable for the misrepresentations of its agent. *Id.* at 383-84.

Appropriations Clause prohibits the judiciary from granting any money claim against the federal government that is not authorized by statute. *Id.* at 424, 434. That clause succinctly provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Its fundamental purpose is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to . . . the individual pleas of litigants." *Richmond*, 496 U.S. at 428.

In *Richmond*, the Supreme Court considered whether a retired federal employee could prevent the federal government from enforcing a statutory earnings limit in a federal disability annuity. *See id.* at 415-16. The employee had qualified for disability payments under the annuity, but after receiving erroneous advice from a federal official, had disqualified himself by exceeding the earnings limit. *See id.* at 417-18. The employee sued the federal government to recover the unpaid disability benefits, alleging that it was estopped from applying the earnings limit. *See id.* at 415-16. The Supreme Court held that the employee could not recover the unpaid disability payments, because, in enacting the disability statute, Congress had appropriated funds to pay benefits to only those individuals who earned less than a specified amount. *See id.* at 424-27, 434. In reaching that decision, the Court recognized that the Appropriations Clause prohibits the judiciary from awarding claims against the United States that are not authorized by statute. *See id.* at 424-26. It then concluded that the "judicial use of the equitable doctrine of estoppel cannot grant [a claimant] a money remedy that Congress has not authorized." *Id.* at 426

Because the holding in *Richmond* was based on the Appropriations Clause, its scope is not limited to the applicability of estoppel to the federal government. *See Richmond*, 496 U.S. at 426 (noting that the presidential power to pardon does not override the command of the Appropriations Clause) (citing *Knote v. United States*, 95 U.S. 149 (1877)). It is an axiomatic principle of constitutional law that the judiciary's power is limited by a valid reservation of congressional control over public funds. *See Richmond*, 496 U.S. at 425. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id.* Indeed, we would equally usurp Congress's exclusive power to appropriate money were we to award an unauthorized money claim based on a theory of substantial compliance or notice prejudice. We therefore interpret *Richmond* to preclude a court from granting a remedy that draws funds from the Treasury in a manner that is not authorized by Congress.

In light of that conclusion, it is clear that a claimant under a standard flood insurance policy may not avoid strict enforcement of the 60 day sworn proof of loss requirement, except through a valid waiver by the Federal Insurance Administrator. *See* 44 C.F.R. § 61.13(d); 44 C.F.R. pt. 61, app. A(1), art. 9(J)(7) (setting forth the conditions for waiver). FEMA currently operates the flood insurance program under Part B of the National Flood Insurance Act and pays claims out of the National Flood Insurance Fund, which is located in the Treasury. *See* 42 U.S.C. 4017(a), (d) (authorizing the creation of a flood insurance fund in the Treasury to disburse claims made under a federally operated

program); *Sandia Oil Co. v. Beckton*, 889 F.2d 258, 263 (10th Cir. 1989) (stating that the National Flood Insurance Fund is the ultimate risk bearer under the Part B flood insurance program). The Director of FEMA has authority to borrow an additional $500 million from the Treasury to pay claims when the National Flood Insurance Fund has insufficient funds.[6] *See* 42 U.S.C. § 4016.

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6. Loans from the Treasury are repaid with special appropriations or with newly written flood insurance premiums. Prior to 1986, Congress regularly appropriated money to the National Flood Insurance Fund to repay additional loans from the Treasury. *See, e.g.*, Act of Dec. 15, 1980, Pub. L. No. 96-526, 94 Stat. 3044, 3053 (appropriating $575,000,000 to the fund); Act of Dec. 23, 1981, Pub. L. No. 97-101, 95 Stat. 1417, 1425 (appropriating $373,000,000 to the fund); Act of Sept. 30, 1982, Pub. L. No. 97-272, 96 Stat. 1160, 1169 (appropriating $39,159,000 to the fund); Act of July 12, 1983, Pub. L. No. 98-45, 97 Stat. 219, 228 (appropriating $37,521,000 to the fund); Act of July 18, 1984, Pub. L. No. 98-371, 98 Stat. 1213, 1224 (appropriating $200,205,000 to the fund); Act of Nov. 25, 1985, Pub. L. No. 99-160, 99 Stat. 909, 918 (appropriating $92,852,000 to the fund). Since then, FEMA has instituted a policy of repaying Treasury loans with revenues from written flood insurance premiums. *See generally* U.S. General Accounting Office, *Flood Insurance: Financial Resources May Not Be Sufficient to Meet Future Expected Losses*, Letter Report No. RCED-94-80, 3-3.3 (1994) (explaining the NFIP's goal of using revenues to pay losses and expenses). Written premiums, however, are not always sufficient to cover flood losses and also repay loans from the Treasury. According to FEMA, the NFIP owed the Treasury $541 million in unpaid loans as of August 31, 1999. *See National Flood Insurance Program: Before the House Subcomm. on Housing and Community Opportunity*, 106th Cong. __ (1999) (statement of Stanley J. Czerwinski, Associate Director, United States General Accounting Office, Housing and Community Development Issues,

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Under the NFIP regulations, WYO insurers also pay claims out of the National Flood Insurance Fund. The federal government is a guarantor and assumes full liability for flood insurance policies that are issued by WYO insurers. *See* 44 C.F.R. § 62.23(f); 64 Fed. Reg. 27705, 27708 (1999) (stating that WYO insurers "do not have to pay for reinsurance for their flood business since the Federal Government assumes the liability for flood losses"). WYO insurers must remit to the Federal Insurance Administration for deposit in the National Flood Insurance Fund all funds that are not necessary to meet their current expenditures. *See* 44 C.F.R. pt. 62, app. A, arts. II(E), VII(B). WYO insurers may later draw money from the National Flood Insurance Fund, through letters of credit issued by FEMA, to pay claims or expenses that exceed the funds retained to meet current expenditures. *See* 44 C.F.R. pt. 62, app. A, arts. II(E), IV(A), VII(A).

Flick contends that WYO insurers retain a sufficient amount of premiums in segregated accounts to pay flood losses as they occur.[7] We reject that assertion. The NFIP

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Resources, Community, and Economic Development Division). That amount was expected to increase as the NFIP began to pay flood losses caused by the 1999 hurricane season. *See National Flood Insurance Program: Before the House Subcomm. on Housing and Community Opportunity*, 106th Cong. __ (1999) (statement of James Lee Witt, Director, Federal Emergency Management Agency) (predicting that the current level of borrowing will approach $700 million as the NFIP continues to pay claims resulting from Hurricane Floyd).

7. Flick did not present any facts to the district court to suggest that WYO insurers do not draw funds from the National Flood (Cont'd)

regulations plainly indicated that WYO insurers may retain no more funds than are necessary to meet their current expenditures. *See* 44 C.F.R. pt. 62, app. A, arts. II(E), VII(B). The WYO Accounting Procedures Manual limits that amount to a cash reserve of $5,000 plus "established payables" and requires WYO insurers to transmit any excess funds to the Treasury on a weekly basis.[8] *See* National Flood Ins.

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Insurance Fund through letters of credit issued by FEMA. She attempts to cure that error in this appeal by requesting that we take judicial notice of historical statistics indicating that the NFIP's annual total premiums generally exceed its annual total losses.

It is rarely appropriate for an appellate court to take judicial notice of facts that were not before the district court. *Yagman v. Republic Ins.*, 987 F.2d 622, 626 n.3 (9th Cir. 1993); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 558-59 (9th Cir. 1995). We may, however, properly take judicial notice of facts outside of the record when creating new rules of law. *See* Fed. R. Evid. 201, note to subdiv. (a) (stating that a court may undertake an independent search for persuasive data). In this case, though, we deny such a request, because the historical statistics are not relevant to any issue on appeal. *See Ruiz v. City of Santa Maria*, 160 F.3d 543, 548 n.13 (9th Cir. 1998). Those figures do not explain how cash flows between the National Flood Insurance Fund, which is located in the Treasury, and WYO insurers. Nor may that flow of cash be deciphered from the entire program's historical year end statistics with a simple subtraction of the total losses paid from the total premiums earned.

8. The NFIP regulations require WYO insurers to comply with the accounting standards established by FEMA in the WYO Accounting Procedures Manual. *See* 44 C.F.R. pt. 62, app. A, art. II(E). The WYO Accounting Procedures Manual provides, in pertinent part:

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Program, Fed. Emergency Management Agency, *WYO Accounting Procedures Manual* pts. B-5, C-2 (7th ed. 1997); *see also Van Holt*, 163 F.3d at 165 (stating that current expenditures are limited to $5,000).

We do not believe, nor has Flick provided any basis for us to believe, that WYO insurers' retained funds are sufficient to cover claims for flood losses. Flood losses, when they occur, are typically sudden, widespread, and costly. A large percentage of those losses are insured under policies that have been issued at below actuarial rates.[9] It is doubtful, then,

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> Transfer of excess funds from the restricted flood insurance account to the U.S. Treasury is mandatory and should be performed at least once a week. Excess funds are defined as those funds in the restricted account less $5,000 and established payables. Monies in the premium suspense account are to be included in the excess funds calculation. In addition, premiums and federal policy fees collected for policies with future effective dates should be included in the excess funds calculation. Established reserves for claim payments and claim loss adjustment expenses are not included when calculating the excess funds amount.

Id. at pt. C-2 (internal cross reference omitted). Funds retained in the restricted account are considered accounts payable due from the Federal Insurance Administration. *See id.* at pt. B-5. *See also, e.g.*, National Flood Ins. Program, Fed. Emergency Management Agency, *WYO Accounting Training Manual* pts. B-52, B-53 (6th ed. 1996) (providing an example of the method in which cash flows between WYO insurers and the National Flood Insurance Fund).

9. Structures insured at below actuarial rates are not built to NFIP standards and, accordingly, suffer on average five times more

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that WYO insurers can satisfy their obligations to pay flood losses entirely with the funds that they have retained to meet current expenditures. We thus join the Third and Fifth Circuits in concluding that WYO insurers typically deplete their net premium income and draw funds from the National Flood Insurance Fund to pay losses under standard flood insurance policies.[10] *See Van Holt*, 163 F.3d at 165 (stating

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damage than structures insured at actuarial rates. In fiscal year 1993, those structures accounted for 41% of all policies in force under the NFIP. In fiscal year 1998, those structures accounted for 30% of all policies in force. *See National Flood Insurance Program: Before the House Subcomm. on Housing and Community Opportunity*, 106th Cong. __ (1999) (statement of Stanley J. Czerwinski, Associate Director, United States General Accounting Office, Housing and Community Development Issues, Resources, Community, and Economic Development Division).

10. We respectfully disagree with the dissent's attempt to analogize this case to the Third Circuit's decision in *Lovell Mfg. v. Export-Import Bank*, 777 F.2d 894 (3d Cir. 1985). *Id.* (holding that a claim against a private insurer who purchased reinsurance from the federal government was not a claim against the federal government for the purposes of applying the doctrine of equitable estoppel). *Lovell Mfg.* involves a separate agreement for reinsurance entered into between the federal government and a private insurer after the effective date of an insurance policy. *See id.* at 901. With reinsurance, a private insurer assumes the full risk of loss and transfers a portion of that risk to a second insurer or to a group of insurers. *See* Robert E. Keeton and Alan I. Widiss, *Insurance Law: A Guide to Fundamental Principles, Legal Doctrines and Commercial Practices* § 1.3 (prac. ed. 1988). When the federal government acts as a reinsurer, it is the private insurer's reinsurance

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"when WYO companies deplete their net premium income, a phenomenon that occurs regularly because the companies must forfeit a significant portion of the proceeds from their premiums, they draw money from FEMA through letters of credit to disburse claims"); *Gowland v. Aetna*, 143 F.3d 951, 955 (5th Cir. 1998) (stating that payments made pursuant to a WYO issued policy are "a direct charge on the public treasury") (quotations omitted).

Because flood losses, whether insured by FEMA or by a participating WYO insurer, are paid out of the National Flood Insurance Fund, a claimant under a standard flood insurance policy must comply strictly with the terms and conditions that Congress has established for payment.

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claim, and not the policyholder's claim, that is directed toward the public fisc. *See Lovell Mfg.*, 777 F.2d at 901.

This case does not involve a separate agreement for reinsurance. Instead, it involves a claim against a fiscal agent of the United States on a standard flood insurance policy that was issued through the facilities of the federal government and for which the federal government, by way of regulation, has agreed to assume the full risk of loss. *See* 42 U.S.C. § 4055; 44 C.F.R. § 62.23(f). Though policyholders may file claims against WYO Insurers in federal court, we agree with the Third Circuit that the claim is, in reality, a claim against the federal government. *See Van Holt*, 163 F.3d at 165-67. We also note that the Third Circuit relied on *Gowland*, and not *Lovell Mfg.*, when deciding whether a claim against a WYO insurer is directed towards the public fisc. *See Van Holt*, 163 F.3d at 165, 167; *see also Gowland*, 143 F.3d at 955 (holding that a claim against a WYO insurer is a claim against the federal government for the purposes of applying the doctrine of equitable estoppel).

See U.S. Const. art. I, § 9, cl. 7 (stating that funds may be drawn from the Treasury only by act of law); *Richmond*, 496 U.S. at 424, 434. That is the simple, but powerful command of the Appropriations Clause.[11] Congress, through a valid act of delegation to FEMA, has authorized payment of flood insurance funds to only those claimants that submit a timely sworn proof of loss.[12] *See* 44 C.F.R. pt. 61, app. A(1), art.

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11. We also disagree with the dissent's characterization of our holding as relying on cases involving the doctrine of equitable estoppel or sovereign immunity. As discussed in the text of our opinion, our decision is based on the more expansive edict that funds in the Treasury may only be withdrawn in accordance with the terms and conditions set by Congress. *See* U.S. Const. art. I, § 9, cl. 7. The scope of that edict is not limited to cases involving equitable estoppel or sovereign immunity. *See Richmond*, 496 U.S. at 426 (noting that the presidential power to pardon is limited by the Appropriations Clause) (citing *Knote v. United States*, 95 U.S. 149 (1877)).

12. Article 9(J) of the NFIP regulations provides in pertinent part:

> J. Requirements in Case of Loss: Should a flood loss occur to your insured property, *you must*:
>
> . . . .
>
> 3. *Within 60 days after the loss, send us a proof of loss*, which is your statement as to the amount you are claiming under the policy *signed and sworn to by you* and furnishing us with the following information: [information omitted];
>
> . . . .
>
> 6. The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form,

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9(J)(3), (6). We therefore have no more power to award a money remedy to a flood insurance claimant who submits a sworn proof of loss after the 60 day time limit than we have to award a money remedy to a disability benefits claimant whose income exceeds a statutory earnings limit. *See* U.S. Const. art. I, § 9, cl. 7; *Richmond*, 496 U.S. at 424, 434. The 60 day sworn proof of loss requirement is a condition precedent to payment for which all claimants are strictly accountable.

Flick nevertheless suggests that the rule of strict compliance should be inapplicable where the National Flood Insurance Program earns sufficient premiums to pay flood losses entirely out of written premiums.[13] We decline to

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> and she or he may help you to complete it. However, this is a matter of courtesy only, and *you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it.*
>
> . . . .
>
> 7. *We may, at our option, waive the requirement for the completion and filing of a proof of loss in certain cases*, in which event you will be required to sign and, at our option, swear to an adjuster's report of the loss which includes information about your loss and the damages sustained, which is needed by us in order to adjust your claim.

Id. (emphasis added).

13. Flick suggests that the NFIP is self sustaining, because the NFIP has historically earned more premiums in a given year than it

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accept that suggestion, because it ignores the simple fact that policyholder premiums are deposited in the National Flood Insurance Fund. That fund is located in the Treasury. *See* 44 U.S.C. § 4017(a), (d); *Sandia Oil Co.*, 889 F.2d at 263-64. Money may only be withdrawn from it through an

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has paid losses. That conclusion is suspect. The financial condition of the NFIP cannot be ascertained simply by subtracting the historical amount of annual losses paid from the historical amount of annual premiums earned.

Indeed, two recent audits by the United States General Accounting Office ("GAO") have rejected such a line of reasoning. The NFIP's historical annual loss year is based only on FEMA's experience with the NFIP after 1978. Since that time, no catastrophic loss years have occurred, and many years were characterized by unusually low losses. The historical average loss year, therefore, involves less losses than can be expected in future years. Collecting premiums based on the average historical loss year, which is FEMA's current policy, prevents the NFIP from building sufficient reserves to meet future expected long term flood losses. According to the GAO, the NFIP is not actuarially sound. Losses from flood claims and expenses inevitably will exceed the funds available in some future years. *See National Flood Insurance Program: Before the House Subcomm. on Housing and Community Opportunity*, 106th Cong. __ (1999) (statement of Stanley J. Czerwinski, Associate Director, United States General Accounting Office, Housing and Community Development Issues, Resources, Community, and Economic Development Division) (concluding that the NFIP currently is not actuarially sound); United States General Accounting Office, *Flood Insurance: Financial Resources May Not Be Sufficient to Meet Future Expected Losses*, Letter Report No. RCED-94-80, 3-3.3 (1994) (concluding that the NFIP was not actuarially sound as of fiscal year 1993).

act of law. U.S. Const. art. I, § 9, cl. 7. It is not relevant that the National Flood Insurance Fund may be currently self sustaining. *See Richmond*, 496 U.S. at 425 (stating "[h]owever much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned") (quoting *Reeside v. Walker*, 52 U.S. 272, 291 (1850)). Nor is it relevant that the fund may consist entirely of policyholder premiums. *See id.* (stating that once "proceeds have been paid into the [T]reasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress") (quoting *Knote v. United States*, 95 U.S. 149, 154 (1877)).

We also decline to accept Flick's suggestion that we find an exception to the rule of strict compliance for flood induced subsidence cases. The terms and conditions of the standard flood insurance policy, which are defined by FEMA under authority from Congress, specifically limit the payment of funds from the National Flood Insurance Fund to claimants who submit a sworn proof of loss within 60 days of a flood loss. *See* 44 C.F.R. pt. 61, app. A(1), art. 9(J)(3), (6). Those same terms and conditions also permit FEMA to waive the sworn proof of loss requirement at its own behest. *See id.* at art. 9(J)(7). When read together, the provisions of Article 9(J) indicate that FEMA sought to reserve to itself the exclusive power to dispense with the proof of loss requirement. That reservation of power is also a reservation of the delegated power to allocate public funds to claimants under exceptional circumstances. Though the circumstances of flood induced subsidence may tempt one to read the NFIP regulations leniently, the Supreme Court has cautioned us

that not even the temptation of a hard case may elude the clear meaning of federal regulations. *See Richmond*, 496 U.S. at 420 (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1947)). Under the Appropriations Clause, we are powerless to order the payment of funds to claimants in circumstances that FEMA has not deemed exceptional.

Though our decision is premised on the Appropriations Clause, the outcome of this case is equally supported by the unique interests involved when the federal government participates extensively in a flood insurance program that is national in scope. The success of the NFIP, so far, has depended on the ability of the federal government and participating insurers to offer flood insurance at below actuarial rates. We find no reason to conclude that FEMA has structured flood insurance premiums in anticipation of the possibility that the federal government may have to pay the additional claims of policyholders who fail to comply strictly with the sworn proof of loss requirement or who fail to obtain a valid waiver from the Federal Insurance Administrator. In adhering to a rule of strict compliance, we thus avoid disturbing the delicate balance, which FEMA has sought to strike, between the need to pay claims and the need to ensure the long term sustainability of the NFIP. We also avoid the inconsistent results that would occur were we to treat standard flood insurance policies differently depending on whether they are written by WYO insurers or FEMA.[14]

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14. As discussed in the text, there is a compelling government interest in assuring uniformity of decision in cases involving the NFIP. *See Brazil*, 763 F.2d at 1075. We note that the disposition suggested by the dissent would lead to the anomalous result that

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Our holding does not suggest that claimants must always strictly comply with the 60 day sworn proof of loss requirement. In the case of a loss due to flood induced subsidence or a similar misfortune, the federal government may well wish to grant relief from the rule of strict compliance. In fact, FEMA has designed a specific mechanism for requesting such relief. *See* 44 C.F.R. pt. 61, App. A(1), art. 9(J)(7) (allowing the Federal Insurance Administrator to waive the sworn proof of loss requirement).[15] Our decision merely recognizes the fact that, in the absence of congressional action or a valid waiver by

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standard flood insurance policies written by WYO insurers would be subject to special rules, such as the rule of notice prejudice or substantial compliance, while standard flood insurance policies written by FEMA would not. *See Seattle Fur Exchange v. FCIA*, 7 F.3d 158, 163 (9th Cir. 1993) (applying the rule of strict compliance to an insurance policy issued, in part, by the federal government). Such a result would provide greater coverage at the same price to policyholders who purchase insurance through the WYO program and conflict with FEMA's goal that flood insurance policies be "standard." *See* 44 C.F.R. §§ 61.4(b), 61.13(d), 62.23(c), 62.23(d) (providing that the terms and conditions of flood insurance policies shall be fixed by FEMA and issued without alteration); 48 Fed. Reg. 46789 (1983) (stating that coverage under the WYO program is to be identical in scope and in price to coverage provided by FEMA).

15. We emphasize that Flick did not request the Federal Insurance Administrator to waive the sworn proof of loss requirement, despite the fact that she allegedly needed additional time to compile reports by experts to support her position. The issue of whether the denial of such a request would be proper is therefore not before us.

FEMA, we may not dispense with the terms and conditions established for the payment of flood losses that are insured under standard flood insurance policies.

IV

Having decided that a claimant under a standard flood insurance policy must strictly comply with the 60 day sworn proof of loss requirement, we turn to the facts of this case. In the proceedings below, the parties stipulated that Liberty Mutual insured Flick against flood loss under a standard flood insurance policy. That policy was issued as part of the National Flood Insurance Program. The parties also stipulated that Flick suffered a flood loss on December 11, 1995, and that Flick did not submit a sworn proof of loss until September 17, 1996, approximately nine months after the date of loss. Because Flick failed to comply strictly with the policy's 60 day sworn proof of loss requirement, the district court properly granted summary judgment in favor of Liberty Mutual.

AFFIRMED.

Appendix A

SCHROEDER, Circuit Judge, Dissenting:

This flood insurance claimant gave the insurance company timely notice of the existence of her claim and informed it of the full amount of the claim as soon as it was known. In holding she must nevertheless be denied insurance benefits because of a failure to comply to the letter with the policy provision requiring a sworn proof of loss within 60 days, the majority announces an unduly harsh and unworkable rule. The holding conflicts with our prior recognition that standard insurance law principles should apply to the administration of the National Flood Insurance Program and with generally recognized state-law principles that literal compliance with a proof of loss provision is not required where compliance was not possible, or where substantial compliance provided the insurer with adequate notice of the claim.

In this case, Irene Flick made a claim on February 6, 1996, under a flood insurance policy underwritten by Liberty Mutual. This was 56 days after the flood loss occurred. Liberty Mutual dispatched a claims adjuster who inspected the home, completed a national flood insurance report, and noted the resettlement under the home, but concluded that the damage was not a result of the December 11th flooding. Flick attempted repeatedly to provide further information. On March 28, 1996, Flick's attorney offered to provide any information available in a proof of loss and requested a blank form for that purpose. However, the adjuster handling the claim insisted that Flick sign the report prepared by the adjuster which, according to Flick, contained numerous errors. Flick's claim was formally denied on April 8, 1996.

On May 24, 1996, Flick's attorney again requested a form to be used for submitting proof of loss; on June 14, 1996, the adjusters again insisted that Flick sign the allegedly erroneous report.

After concluding the geophysical, structural, and financial analyses needed to evaluate the damage to her home, Flick's attorney submitted a sworn proof of loss on his own form on September 17, 1996. In a letter dated October 9, 1996, an adjuster rejected Flick's proof of loss form and stated that "the insured was given the form by the adjuster and I sent one to [Flick's attorney's] office with my 6/14/96 correspondence," apparently referring to the flawed report prepared by the original claims adjuster. This suit followed.

Flick contends, and the government does not dispute for purposes of this appeal, that she could not have provided a complete proof of loss statement within 60 days of the date of the flooding. In fact where, as here, the damage is caused by flood-induced ground subsidence under a foundation, it is probable that the full amount of loss can almost never be known within 60 days. Flick offers reports by experts in geotechnical engineering, structural engineering, construction and real estate appraisal in support of that position.

This court has held that "[i]n creating the [National Flood Insurance] Program, Congress did not intend to abrogate standard insurance law principles." *Brazil v. Giuffrida*, 763 F.2d 1072, 1074-75 (9th Cir. 1985) (citing *Hanover Building Materials v. Guiffrida*, 748 F.2d 1011, 1013 (5th Cir. 1984));

Drewett v. Aetna Casualty & Surety Co., 539 F.2d 496, 497-98 (5th Cir. 1976). Accordingly, although we are dealing with a federal insurance program, we are to "draw[ ] upon standard insurance law principles" when interpreting policies issued under this program. *Id.* (citing *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1978)).

Under ordinary principles of insurance law applicable in a majority of states, including California, Flick's claim would be considered adequately presented and the 60-day proof of loss requirement excused on grounds of substantial compliance. *See* Windt, *Insurance Claims and Disputes* § 3.03 n.23 (3d ed. 1995) (citing cases); Croskey, Kaufman et al., *California Practice Guide: Insurance Litigation* § 3:166-67 (Rutter 1995). The claim Flick made on February 6, 1996, was sufficient to put the insurer on notice that further inquiry was required. In fact, after receiving Flick's notice of claim the insurance company did make further inquiry.

Also, in a growing majority of states an insurer can deny coverage for failure to submit a timely notification of loss only if the insurer proves prejudice as a result of the delay. *See* Ostrager & Newman, *Handbook on Insurance Coverage Disputes* § 4.02(c)(2)-(4) (9th ed. 1998) (citing cases); *Insurance Litigation* at § 3.168-69; *see also Insurance Claims and Disputes* at § 3.03 n.27 (noting that, in a majority of jurisdictions, a failure to submit a timely proof of loss will not result in denial of coverage unless prejudice is shown). It is difficult to see how the insurer was prejudiced by the failure to submit a sworn claim on a designated form until after February 10, 1996.

Appendix A

In rejecting the claimant's strong legal arguments, the majority confuses this case with cases against the United States involving sovereign immunity and claims of estoppel on the basis of inaccurate statements by government agents. *See Wagner v. Director, FEMA*, 847 F.2d 515, 518-20 (9th Cir. 1988) (60-day proof of loss requirement for federal flood insurance claims had to be strictly construed in action against FEMA because it constituted a "condition [ ] precedent to a waiver by the federal government of its sovereign immunity"); *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) (estoppel not available against the government despite reliance on erroneous statement by official); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (estoppel not available against the government for monetary claim because Congress had not appropriated funds for such claims). This is not an estoppel case, nor is it a suit involving sovereign immunity. It is an insurance policy interpretation case that happens to involve insurance issued under a governmental subsidy program.

Moreover, there is nothing on the face of the policy to suggest the insured has a contractual relationship with anyone other than a private insurer, or that a claim made under the policy would be a direct charge on the public treasury. This case is therefore unlike *Seattle Fur Exchange v. FCIA*, in which this court required strict compliance with the terms of an insurance policy because it "specifically identifie[d a government agency] as the reinsurer" and therefore "provide[d] a direct contractual link" between the insured and the government agency. 7 F.3d 158, 163 (9th Cir. 1993). In fact, the matter before us more closely resembles *Lovell Mfg. v. Export- Import Bank*, 777 F.2d 894 (3d Cir. 1985), a

case distinguished by the *Seattle Fur Exchange* panel. In that case, the Third Circuit held that because no provision in a privately issued insurance policy outlined the reinsurance agreement between the private insurer and a government agency, the insured's claim was only against the private insurer and did not involve a charge on the Treasury. *See Lovell Mfg.*, 777 F.2d at 901.

There is no indication anywhere in the legislative history of the National Flood Insurance Act, and certainly not in the case law of our circuit, that harsher rules should apply in the flood insurance context than apply in the ordinary insurance context. Indeed, the majority's result thwarts one of Congress' primary goals in enacting the National Flood Insurance Act of 1968 — ensuring that flood insurance coverage is "available on reasonable terms and conditions to persons who have need for such protection." 42 U.S.C. § 4001(a).

I therefore respectfully dissent.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA DATED AND FILED AUGUST 11, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-97-0703 WHO

IRENE FLICK,

Plaintiff,

vs.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant.

OPINION AND ORDER

This is an insurance action brought by plaintiff Irene Flick ("Flick") against Liberty Mutual Fire Insurance Company ("Liberty"), pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. § 4001, *et seq*. Both parties have filed motions requesting that the Court rule at the pretrial conference on the issue of whether Flick's claims are barred as a matter of law due to her failure to file a timely sworn proof of loss. Having carefully reviewed the parties briefs, the Court finds that the issue is appropriate for decision without a hearing, and grants summary judgment for Liberty on all claims.

Appendix B

I.

Flick owns a house at 110 Tiptoe Lane in Burlingame, California, which is insured by Liberty. On December 11, 1995, Flick's home suffered storm damage to a picture window and a solar heating panel. Flick initially attributed the losses to wind damage. On December 21, 1995, Liberty sent a claims adjuster to Flick's residence to inspect the damage, authorized payment for repairs under Flick's homeowner's policy, and closed the file on the claim on January 5, 1996.

On February 6, 1996, fifty-seven days after the loss occurred, Flick, through her attorney, made a claim under her national flood insurance policy, which Liberty also insured. Flick did not submit a sworn proof of loss as required by the policy. The flood insurance policy was issued by Liberty, as a "Write-Your-Own" ("WYO") insurer authorized by the Federal Emergency Management Agency ("FEMA"), pursuant to the National Flood Insurance Act of 1968. 42 U.S.C. § 4001, *et seq*. Liberty reported the flood claim to FEMA and authorized an independent adjusting company to inspect the alleged flood damage.

At this point, Flick asserted that the cracked picture window was damaged as the result of earth settling underneath her home due to a flood caused by the storm of December 11, 1995, and not as a result of wind as she had previously claimed. Flick contends that the flood caused $290,000 in structural damage to her home.

The adjuster noted evidence of earth settlement under Flick's home, but did not find the earth settlement was caused

by the peril of flood insured under the standard flood insurance policy. The adjuster recommended coverage only for some cleaning and disinfecting, and for the labor involved in sandbagging Flick's house.

Liberty denied the remainder of Flick's claim, by correspondence dated April 8, 1996. Liberty also notified Flick that she had not submitted a sworn proof of loss statement within sixty days of the loss, as required by the flood insurance policy. Flick finally submitted a sworn proof of loss on September 17, 1996, approximately nine months after the incident causing the alleged loss, and more than five months after her claim was denied.

On February 26, 1997, Flick filed this action, asserting claims against Liberty for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. On April 9, 1998, Liberty moved for partial summary judgment on the issue of whether federal law preempted Flick's claims. That motion was withdrawn when Flick stipulated that "federal law pre-empts state law with regard to the rights and remedies of the parties, including, but not limited to, damages." (Mot. In Limine of Liberty that Pl. Be Barred From introducing Any Evid. or Argument that the Federal Flood Insurance Plan is Fraudulently Administered and Should Be the Subject of a Crim. Investigation, filed May 28, 1998.)

II.

Both parties have requested that the Court rule at the pretrial conference on the issue of whether Flick's claims against Liberty are barred because of her failure to file a

timely sworn proof of loss statement in violation of the conditions of the policy.

It is undisputed by the parties that Flick's policy explicitly requires the insured to submit a sworn proof of loss within sixty days of the date of the loss swearing to, among other things, the actual cash value or replacement loss of each damaged item of insured property and the amount of damages sustained.[1] This language also appears in the

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1. According to Liberty, the Policy provision in dispute reads:

> J. Requirements in Case Of Loss: Should a flood loss occur to your insured property, you must:
>
> . . . . .
>
> 3. Within 60 days after the loss, send us a proof of loss, which is your statement as to the amount you are claiming under the policy signed and sworn to by you and furnishing us with the following information:
>
> a. The date and time of the loss;
>
> b. A brief explanation of how the loss happened;
>
> c. Your interest in the property damaged (for example, "owner") and the interest, if any, of others in the damaged property;
>
> d. The actual cash value or replacement cost, whichever is appropriate, of each damaged item of insured property and the amount of damages sustained;

(Cont'd)

Appendix B

Standard Flood Insurance Policy "dwelling form" set forth at 44 C.F.R. Part 61 App. A(1) at 268 (1997). All flood insurance made available under the National Flood Insurance Program is subject to the terms and conditions of the Standard Flood Insurance Policy. 44 C.F.R. §§ 61.4, 61.13(d). It is undisputed that the flood loss occurred on December 11,

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(Cont'd)

> e. Names of mortgagees or anyone else having a lien, charge or claim against the insured property;
>
> f. Details as to any other contracts of insurance covering the property, whether valid or not;
>
> g. Details of any changes in ownership, use, occupancy, location or possession of the insured property since the policy was issued;
>
> h. Details as to who occupied any insured building at the tire of loss and for what purpose; and
>
> i. The amount you claim is due under this policy to cover the loss, including statements concerning:
>
> (1) The limits of coverage stated in the policy; and
>
> (2) The cost to repair or replace the damaged property (whichever costs less).

Def.'s List of Trial Exs. Ex. B, Dwelling Policy at 17. This language also appears in the standard Flood Insurance Policy "dwelling form" set forth at 44 C.F.R. Pt. 61 App. A(1) at 268 (1997).

1995, and that Flick did not submit a sworn proof of loss until September 17, 1996, far more than sixty days after the loss occurred.

Flick contends that she was not aware that the damage to her home was the result of flood damage until mid-January or early February 1996. Even if the Court adopts the latter date as the date of loss, Flick still failed to submit a sworn proof of loss within sixty days.

She also argues that it was impossible for her to file a sworn proof of loss any earlier than she did, because she had to obtain an appraisal of her home, and hire experts in the areas of geotechnical engineering and structural engineering, in addition to hiring contractors to provide repair estimates pursuant to the plans and specifications of the other experts. Flick contends that she complied with the intent of the proof of loss requirement by filing a notice of claim on February 6, 1996, which contained some of the information required by the proof of loss. She also contends that Liberty delayed her from filing a sworn proof of loss by failing to provide her with the proper form.[2] Flick argues that Liberty can show no prejudice because it had notice of each of the elements of the proof of loss as soon as they were available. Liberty contends, however, that claimants must adhere strictly to the policy conditions, and claimants who do not meet the strict technical requirements of the policy are prevented from recovery.

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2. Although neither party mentions it, the policy expressly precludes this argument: "[Y]ou must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it." 44 C.F.R. Pt. 61, App. (A)(1) at 269.

Appendix B

Federal law governs disputes over the interpretation and coverage of insurance policies issued pursuant to the National Flood Insurance Act. *Brazil v. Giuffrida*, 763 F.2d 1072, 1074 (9th Cir. 1985) (quoting *West v. Harris*, 573 F.2d 873, 881 (5th Cir. 1978), *cert. denied*, 440 U.S. 946 (1979)). Because the federal government participates extensively in the program, both financially and in a supervisory capacity, the interest in uniformity of decision requires the application of federal law. *Id.* As Congress did not intend to abrogate standard insurance law principles, the Court may draw upon such principles in interpreting a flood insurance policy, but the statutory and decisional law of any particular state is not controlling. *Id.*

Liberty cites *Wagner v. Director, Federal Emergency Management Agency*, 847 F.2d 515 (9th Cir. 1988), in support of its position. The plaintiffs in *Wagner* informally advised FEMA of their claims, but none of the plaintiffs filed a sworn proof of loss until seven months after the damage had occurred. *Id.* at 517. Some of the plaintiffs never filed a sworn proof of loss. *Id.* The court held that the policy's requirements must be taken seriously because they "constitute conditions precedent to a waiver by the federal government of its sovereign immunity[.]" *Id.* at 518. The plaintiffs in *Wagner* claimed that FEMA should be estopped from denying coverage because they relied to their detriment on FEMA's failure to immediately raise the proof of loss requirement as a defense to coverage. *Id.* at 519. The court held that the government could not be estopped, absent proof of some affirmative misconduct, going beyond mere negligence, which caused a serious injustice. *Id.* There must also be a showing that the public's interest will not suffer

undue damage by imposing liability upon the government. *Id.* A mere failure to inform or assist does not justify application of equitable estoppel. *Id.* As there was no evidence of affirmative misconduct, the court found that summary judgment was appropriate for FEMA as to the claims of the plaintiffs that never filed sworn proofs of loss. *Id.* at 520. As to the plaintiffs that filed late proofs of loss, the court found that those plaintiffs could only assert claims for damage that occurred within 60 days of the date they submitted the sworn proof of loss. *Id.*

Flick contends that *Wagner* is distinguishable because here the defendant is the insurer, not the government. Flick cites no applicable case law in support of her argument, but instead relies on California law, and federal law that does not apply to national flood insurance policies. Although there is no case law directly on point in the Ninth Circuit, other courts have found that the proof of loss requirement is applied strictly even when, as here, the defendant is not the government. *See, e.g., Gowland v. Aetna*, 143 F.3d 951 (5th Cir. 1998); *Gagliardi v. The Omaha Property & Ins. Co.*, 952 F. Supp. 212 (D.N.J. 1997); *Steelcraft, Inc. v. Bankers & Shippers Ins. Co.*, 979 F. Supp. 60 (D. Mass. 1997).

The Fifth Circuit's opinion in *Gowland* is nearly on all fours with this case, and persuades the Court that summary judgment be granted in Liberty's favor. In *Gowland*, the plaintiffs notified the insurer, Aetna, that their home had suffered foundation damage as a result of a flood, but that they could not ascertain the extent of the damage until the water receded from the structure. 143 F.3d at 952. The plaintiffs gave the insurer notice of their claim within sixty

days, but did not provide a sworn proof of loss. The plaintiffs argued that they had substantially complied with the proof of loss provision by filing a notice of loss. *Id.* at 953. They also argued that Aetna had waived the proof of loss requirement, and was equitably estopped from asserting the proof of loss requirement, because it had repeatedly reopened the claim and had never mentioned the absence of a sworn proof of loss as a reason for denying the claim until the litigation. *Id.*

The Fifth Circuit rejected all of these arguments and held that the proof of loss requirement must be strictly construed and enforced. *Id.* at 954. The court noted that, pursuant to federal regulation, no provision of the policy may be altered, varied, or waived without the express written consent of the Federal Insurance Administrator. *Id.* at 953 (citing 44 C.F.R. § 61.13(d)). In addition, Aetna's letters expressly stated that it was not waiving any rights or defenses under the policy. *Id.* The court found that there could be no claim of estoppel because, although the policy was written by Aetna, a private insurance company, claims brought pursuant to federal flood insurance policies are paid out of the federal treasury. *Id.* at 955. "When federal funds are involved, the judiciary is powerless to uphold a claim of estoppel because such a holding would encroach upon the appropriation power granted exclusively to Congress by the Constitution." *Id.*

The court affirmed summary judgment for Aetna. *Id.*

We find that the theories of substantial compliance, waiver, and equitable estoppel are inapplicable to the facts presented herein. While

> this result may seem harsh in light of the Gowlands' ongoing negotiations with Aetna, we must remind them that the National Flood Insurance Program is federally subsidized and enables consumers to obtain flood insurance which virtually would be impossible to purchase in the marketplace. Requiring the Gowlands to turn square corners when dealing with the Treasury "does not reflect a callous outlook. It merely reflects the duty of all courts to observe the conditions defined by Congress for charging the public treasury."

Id. (quoting *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947)). *See also Gagliardi*, 952 F. Supp. at 218 (rejecting plaintiffs' arguments that they substantially complied with the proof of loss requirement, and that the insurer waived, and was estopped from asserting, the proof of loss requirement); *Steelcraft*, 979 F. Supp. at 63 (finding that plaintiff was barred from bringing claim against insurer because it filed a late proof of loss).

Here, as in *Gowland*, Flick failed to file a timely sworn proof of loss, allegedly because she could not acquire the estimates of the extent of the damage, and the cost of repairing it, in time.[3] Here, as in *Gowland*, Flick contends that the insurer should be estopped from relying on the proof of loss provision because of its conduct in handling the claim.

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3. The Court notes that even if impossibility could provide a basis for equitable tolling of the sixty day period for filing a proof of loss, Flick has not submitted any admissible evidence that it was impossible for her to comply with the sixty day deadline.

Here, as in *Gowland*, the insurer repeatedly and expressly stated in its correspondence that it was not waiving any rights or defenses under the policy. *See* Leaf Decl. Exs. 4, 8, 10, 12. In addition, Flick signed an agreement expressly providing that any action taken by Liberty would not waive or invalidate any of the terms or conditions of the policy. *Id.*, Ex. 3.

Following *Wagner* and *Gowland*, Flick is barred from asserting her claims against Liberty, due to her failure to file a sworn proof of loss within sixty days of the date of loss. Although Flick could theoretically assert a claim for any damage occurring within sixty days prior to the submission of her sworn proof of loss, she has not asserted any such damage. Because the parties stipulated that federal law governs all of Flick's causes of action, and because Liberty properly denied Flick's flood insurance claim, the Court grants summary judgment for Liberty on all of Flick's causes of action.

III.

Accordingly,

IT IS HEREBY ORDERED that Liberty's motion for summary judgment is GRANTED, and the above-entitled action is dismissed with prejudice.

Dated: August 11, 1998.

s/ William H. Orrick
William H. Orrick
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 29, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-16485
DC# CV-97-00703-WHO

IRENE FLICK,

Plaintiff-Appellant,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendant-Appellee.

ORDER

Before: GOODWIN, SCHROEDER, and ALARCÓN, Circuit Judges.

Judges Goodwin and Alarcón have voted to deny the petition for rehearing and recommend rejection of the petition for rehearing en banc. Judge Schroeder would grant the petition for rehearing and grant the petition for rehearing en banc.

Appendix C

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is Denied and the petition for rehearing en banc is Denied.